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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

Jeremiah W. (Jay) Nixon, Attorney General of Missouri, and John Maupin, Chairman, Missouri Ethics Commission, *Petitioners*,

v.

Thomas D. Carver, *Respondent*.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITIONERS' REPLY BRIEF

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PETITIONERS' REPLY BRIEF

REPLY TO RESPONDENT'S REASONS WHY THE WRIT SHOULD NOT BE GRANTED

Respondent offers two reason for denying the petition: that the record is inadequate to decide the compelling state interest issue he assumes applies, and that the number of judicial challenges to campaign contribution limits is not sufficient to justify this Court's attention. The first argument is misguided because it assumes the answer to a core legal question presented: what is the proper standard of judicial review of limits on campaign contributions? Respondent does not even discuss *California Medical Ass'n v. FEC*, 453 U.S. 182 (1981), which at a minimum indicates that heightened scrutiny is not appropriate for examining the constitutionality of contribution limits.

The second argument completely ignores petitioners' argument on this point, which is that the decision below directly interferes with the widespread and growing grassroots movement attempting to lower limits on campaign contributions. Because of these political developments, which are being distorted by the court of appeals' constitutional ruling, the Court should intervene sooner rather than later to ensure that the political debate is focused on issues of policy and not distracted by constitutional concerns.

In sum, respondent has not remotely justified postponing resolution of the fundamental questions concerning the constitutional standard for judging limits on campaign contributions. Accordingly, the Court should grant the petition and eliminate the confusion concerning how *Buckley v. Valeo*, 424 U.S. 1 (1976), applies to lower contribution limits.

1. Respondent's primary argument is that the record in this case is inadequate to permit the Court to evaluate whether Proposition A is narrowly tailored to achieve the concededly (Opp. 7) compelling state interest of eliminating the perception of corruption created by handing hundreds of dollars to candidates to use as they wish. But, if the appropriate standard of review is a rational relationship standard, which is a question presented, then the record plainly is adequate to justify the limits in Proposition A. On the legal issue of the proper standard of review, respondent is utterly silent, preferring to assume that he is correct.

Although the Court has not definitively resolved the issue, it certainly has indicated that the court of appeals and the respondent are incorrect in their assumption that Missouri must advance a compelling state interest for its

contribution limits. What this Court has recognized is that contribution limits involve nothing more than "a marginal restriction upon a contributor's ability to engage in free communication." *Buckley*, 424 U.S. at 20, 21. To be sure, the *act* of contributing was held to be protected by the First Amendment, because by contributing the payor provides "a general expression of support for the candidate and his views." *Id.* at 21. But merely by contributing the payor does not "communicate the underlying basis for the support." *Id.* Accordingly, this Court recognized in *Buckley* that "[t]he quantity of communication by the contributor does not increase perceptibly with the size of his contribution, since the expression rests solely on the undifferentiated, symbolic act of contributing." *Id.* This logic suggests that an absolute ban on contributions might trigger heightened scrutiny, but that a state law restriction that protects the contributors' right to make symbolic expressions of support for particular candidates, while allowing the contributors to spend whatever they wish (either alone or in groups) to speak on the issues or in support of the candidates, will be treated more deferentially under the Constitution.

The argument against heightened scrutiny is made even stronger by the fact that the legislative history of the Federal Election Campaign Act Amendments at issue in *Buckley* did not contain any evidence that anyone had purchased from any public officer, through something near a $1,000 contribution, a single legislative vote, government contract, judicial decision, or any other benefit. This Court affirmed the selection of the $1,000 ceiling without requiring any such evidence. That affirmance is not

consistent with respondent's insistence that strict scrutiny is required.[1]

The argument in favor of rational basis review is reinforced by the plurality's analysis of the constitutional standards in *California Medical Ass'n*, upon which petitioners relied heavily in the petition (Pet. 22-24). There, the plurality indicated that reasonableness was the proper standard to apply to contribution limits. 453 U.S. at 199, 200 n. 20 (Marshall, J.). Moreover, that was plainly the holding of the Ninth Circuit in that case. 641 F.2d at 624. Respondent does not even suggest a reason why the Court should not resolve this lack of clarity concerning the proper legal standard. As the decision below reveals, the legal question is vital to whether campaign limits more restrictive than those approved in *Buckley* are constitutional. Accordingly, the Court should decide the issue.

2. Respondent's alternative argument for denying the petition is that there have been too few judicial opinions on this issue to warrant the Court's attention at this point. But petitioners acknowledged as much in the petition. As discussed there (Pet. 11-14), the 1990's have ushered in a new era of campaign finance reform, one in which the voters, through initiative petitions, are taking into their own

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[1] Of course, if respondent and the Eighth Circuit are correct that some kind of additional record is now required to uphold limits on campaign contributions, then the Court needs to make that point clear sooner rather than later. Most state initiatives will not come wrapped with particularized findings because the Court has never insisted upon them before. Thus, rather than serve as a basis for denying the petition, respondent's obsession with a more formal record provides an additional reason why the Court should decide this issue now.

hands the responsibility to define the level at which they perceive corruption in the political system. Moreover, voters are the best judges of what level of limits will eliminate their perception that the system is being corrupted through contributions made directly to candidates. Nothing in the respondent's brief suggests that this case is any different from *Romer v. Evans*, 882 P.2d 1335 (Colo. 1994), *cert. granted*, 115 S.Ct. 1094 (February 21, 1995) (No. 94-1039), and *U.S. Term Limits, Inc. v. Thornton*, 115 S.Ct. 1842 (1995). In each instance, this Court recognized a grassroots political movement that was determined to use the initiative process to obtain legal change that the people were unable to acquire through the legislatures. In each instance this Court saw fit to address the significant legal question without waiting for a conflict among the circuits, and thus to remove the constitutional cloud over the political debate that the lower courts cast. The same need exists here.

* * * *

Rather than recognizing the movement in the 1990's toward lower limits on contributions to candidates, respondent myopically focuses on the absence of litigation during the first 20 years after *Buckley*. Rather than acknowledging that a large majority of Missouri voters have said that for them the perception of corruption in state and local office arises at a point well below the limits sustained in *Buckley*, respondent asks the Court to wait until a case arises in which a legislative body has evidence of its own actual corruption before returning to the critical constitutional question addressed, but not yet fully answered by this Court. And, rather than attempting to find in prior precedents of this and other courts even a reasonably certain definition of the proper level of scrutiny to be applied to this "marginal restriction upon a contributor's

ability to engage in free communication" (424 U.S. at 20-21), respondent chooses to assume that he is correct that strict scrutiny applies. What respondent cannot deny is that this case raises head on, for the first time since *Buckley*, the increasingly important question of how far state legislatures, city councils, the people by initiative, and even Congress can go when they use the tool of contribution limits as a means of attacking the perception of political corruption. That question deserves this Court's immediate attention.

Respectfully submitted,

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